

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1993 SESSION

**FILED**  
March 22, 1996  
Cecil W. Crowson  
Appellate Court Clerk

ERIC PENDLETON, )  
)  
Appellant, )  
)  
v. )  
)  
STATE OF TENNESSEE, )  
)  
Appellee. )

No. 01C01-9305-CR-00149  
Davidson County  
Hon. J. Randall Wyatt, Jr. , Judge  
(Post-Conviction on remand)

For the Appellant:

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For the Appellee:

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and  
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District Attorney General  
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OPINION FILED: \_\_\_\_\_

AFFIRMED

Joseph M. Tipton  
Judge

## OPINION

\_\_\_\_\_ This case was remanded by the Tennessee Supreme Court for our consideration in light of House v. State, 911 S.W.2d 705 (Tenn. 1995). In our previous opinion, we reversed the Davidson County Criminal Court's dismissal of the petitioner's third post-conviction petition and remanded the case for an evidentiary hearing regarding waiver. In light of House, we conclude that the trial court's dismissal of the petitioner's petition should be affirmed.

The petitioner was convicted of first degree murder and aggravated assault for which he received an effective sentence of life in prison and the convictions were affirmed on appeal. State v. Eric Cordell Pendleton and Willie Lee Williams, No. 87-189-III, Davidson Co. (Tenn. Crim. App. Sept. 28, 1988), app. denied (Tenn. Dec. 27, 1988). A subsequent post-conviction petition asserting the ineffective assistance of trial counsel was denied after an evidentiary hearing and the denial was affirmed on appeal. Eric Pendleton v. State, No. 01-C-01-9001-CR-00008, Davidson Co. (Tenn. Crim. App. Aug. 3, 1990), app. denied (Tenn. Nov. 13, 1990).

The petitioner, pro se, filed a second petition for post-conviction relief on September 24, 1991, a third petition on October 4, 1991, and a "petition to rehear" on October 9, 1991. By these pleadings, the appellant sought to raise grounds for relief dealing with the ineffective assistance of trial counsel and appellate counsel in the convicting case. Regarding appellate counsel, the petitioner asserted that counsel was ineffective for failing to raise several issues on appeal<sup>1</sup> and failing to pursue the issue

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<sup>1</sup>The petition complained about the appellate counsel not raising issues about the state's use of hearsay, improper prosecutor comment before the jury on matters only admitted in a jury-out hearing, the failure to give proper instructions on circumstantial evidence and alibi, and the like.

of the sufficiency of the evidence to the supreme court, even though counsel had raised that issue before this court.

As for why he had not previously raised these issues, the petitioner alleged that he knows nothing about the law, did not previously know what could be raised and that his previous attorneys did not advise him about the existence of such grounds. Also, he alleged that his appellate counsel did not properly advise him that issues were being abandoned on appeal nor of the consequences of such abandonment and that his previous post-conviction attorney failed to advise him of either the abandonment or its giving rise to a ground for relief which could be raised in the first petition for post-conviction relief. The petitioner asserted that he first became aware of the problem when his petition for the federal writ of habeas corpus was dismissed for lack of exhaustion of state remedies. He asserted that he did not "voluntarily, intelligently, or knowingly waive any of these issues" and that an evidentiary hearing should be held in order that his previous attorneys could testify about what he knew or did not know.

The state filed a response in the trial court which essentially contended that all grounds raised had been waived because they could have been and should have been presented in the first post-conviction case. Without hearing any testimony, the trial court dismissed the petition, stating that the petitioner's grounds were waived because they could have been and should have been raised by him in the first post-conviction case.

In our first opinion, we held that the petitioner's allegations of fact in his petition would, if true, rebut the presumption of waiver. However, in House v. State, our supreme court held as follows:

We conclude that a "full and fair hearing" sufficient to support a finding of previous determination occurs if a petitioner is

given the opportunity to present proof and argument on the petition for post-conviction relief. We further conclude that the rebuttable presumption of waiver is not overcome by an allegation that the petitioner did not personally and therefore, "knowingly and understandingly," waive a ground for relief. Instead, waiver is to [be] determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney. Finally, we conclude that there is no right to effective assistance of counsel in post-conviction proceedings, and therefore, an allegation of ineffective assistance of prior post-conviction counsel does not preclude application of the defenses of waiver and previous determination.

911 S.W.2d at 714. Essentially, the court determined that a petitioner is bound by the action or inaction of counsel, or his own ignorance, unless the constitutional right at issue is a fundamental one that may only be waived personally and knowingly by a defendant-petitioner. Id.

Under House, the petitioner's allegations about previous ignorance of the issues and counsel ineffectiveness are for naught in that they do not provide justification for his failure to present these issues in his previous post-conviction case. He does not allege the violation of any right for which a personal waiver is required. In other words, even if taken as true, the allegations in his petition regarding personal ignorance and counsel action or inaction do not rebut the presumption of waiver provided by T.C.A. § 40-30-112(b).

In consideration of the foregoing, the judgment of the trial court dismissing the post-conviction petition is affirmed.

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Joseph M. Tipton, Judge

CONCUR:

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John H. Peay, Judge

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C. Creed McGinley, Special Judge